United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,999

497

BENJAMIN F. O'CONNOR,

Appellant

v.

UNITED STATES OF AMERICA,

Appellee

Appeal From A Judgment of the United States
District Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED APR 1 1969

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QUESTIONS PRESENTED

1. Can a witness, who has been confronted with the defendant under circumstances which were so unnecessarily suggestive and conducive to irreparable mistaken identification as to constitute a denial of due process of law, be allowed to identify the defendant in open court?

2. Can the testimony of a prosecution witness at a prior trial be admitted into evidence and read to the jury, when it appears that the witness is within the jurisdiction of the court?

THE PENDING CASE HAS NOT PREVIOUSLY BEEN BEFORE THIS COURT UNDER THE SAME OR A SIMILAR TITLE.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 21,999

BENJAMIN F. O'CONNOR,

Appellant

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UNITED STATES OF AMERICA,

Appellee

Appeal From A Judgment of the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Benjamin F. O'Connor was indicted on April 5, 1966, by the Grand Jury for the District of Columbia. The indictment was in three counts, assault with intent to commit robbery, assualt with a dangerous weapon, and carrying a dangerous weapon (Orig. Rec.). He pleaded not guilty to all counts on April 15, 1966, was tried in the United States District Court for the District of Columbia on March 4 through March 7, 1968, (tr. 1,418) and was

found guilty as charged by the jury (Orig. Rec.). On April 25, 1968, a judgment of conviction was entered, and the Court sentenced him to imprisonment for a period of three years to ten years on each count, the sentences to run concurrently with each other and also to run concurrently with another sentence which he was then serving (Orig. Rec.). On April 26, 1968, the defendant filed notice of appeal, and on April 28, 1968, the Court granted his petition for leave to appeal without prepayment of costs (Orig. Rec.). This Court has jurisdiction to hear and decide this appeal under 28 U.S. Code §1291 and §1294.

STATEMENT OF THE CASE

On the morning of January 20, 1966, at approximately 10:30 A.M. a single gunman attempted to rob the Argo Market in Washington, D. C. (Tr. 4, 49). Two persons witnessed the attempt, Theodore Perper, the owner of the store, and James Johnson, a customer. The attempt was foiled by the presence of a dog belonging to Mr. Perper and the gunman fled through an alley across the street to an adjacent street (Tr. 5, 50). Both witnesses testified that the gunman's face was at least partially covered by a mask made from a transparent lady's stocking, although the witness Johnson testified that while in the

store he had observed the gunman put on the mask as he came in the store (Tr. 5, 48).

The appellant and his uncle were arrested at approximately 4:00 A.M. the following morning (January 21) and were taken to the Robbery Squad Room at Metropolitan Police Headquarters (Tr. 216, 277). The witnesses Perper and Johnson were summoned, arriving shortly after 4:00 A.M. (Tr. 30, 62), at which time they were confronted with appellant and his uncle (Tr. 28, 62, 75-97) (Pr. H. 4-90) 1/. During this confrontation, both witnesses identified appellant as the person who had attempted the robbery (Pr. H. 22) (Tr. 64).

Because of the circumstances of the confrontation the District Court conducted a preliminary hearing (Pr. H. 3-90) and a hearing out of the presence of the jury (Tr. 75-92) at which testimony was taken from the witness and the policy officers who had conducted the confrontation. At the confrontation, appellant and his uncle were the only persons present, and the uncle's appearance was completely different from that of appellant (Pr. H. 11, 39); the confrontation took place at a most unusual hour (Tr. 30, 62); and the witnesses may have been aware that the police considered the appellant to be the persons who had committed the crime (Pr. H. 23, 25, 39-43).

1/ Throughout this brief the notation (Tr. __) will refer to page numbers in the transcript of the trial proceedings, and (Pr. H. __) will refer to page numbers in the transcript of the proceedings at the preliminary hearing.

As a result of the information developed at these hearings, the District Court ruled that the prosecution could not offer any evidence relating to the pre-trial identification (Pr. H. 89). The witnesses were permitted, however, to identify the appellant in open court (Tr. 8, 49). In support of this ruling, the District Court entered a written opinion dated April 9, 1968, which is reported as United States v. O'Connor, 282 F.Supp. 963 (D.D.C. 1968).

During the trial, a prosecution witness at a prior trial of the defendant (which had ended in a mis-trial) failed to appear to testify (Tr. 95). After conducting a hearing into the circumstances of the government's attempt to secure her attendance (Tr. 94-129), the District Court allowed the transcript of the witness' previous testimony to be read to the jury (Tr. 155-176). On May 15, 1968, the District Court re-examined its holding in light of the Supreme Court's opinion in Barber v. Page, U.S. , 20 L.ed. 2d 255 (1968). In a Memorandum, the Court stated that its original holding was correct and the appellant was not prejudiced by this procedure because of the prior cross-examination, the nature of the testimony, and because the government's attempt to secure the witness' attendance were "diligent and comprised a 'good faith effort.'"

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment Number Five to the Constitution of the United States, and District of Columbia Code (1967 ed. as amended) Title 22, Sections 501, 502, and 3204, printed as an appendix to this brief.

STATEMENT OF POINTS

The District Court erred:

1. In permitting the witnesses to identify appellant during the trial, because they had been permitted to view the appellant, prior to trial, in circumstances which denied him the due process of law.

2. In permitting the prosecution to introduce into evidence the testimony of a witness recorded at a prior trial, because the witness was within the jurisdiction of the Court.

SUMMARY OF ARGUMENT

I. Erroneous Identification.

The Government's witnesses should not have been permitted to identify appellant at the trial because the procedure by which they had viewed appellant prior to trial had been so unnecessarily suggestive and conducive to irreparable mistaken identity as to result in a denial of due process of law. The witnesses will, in such circumstances retain in their memories the image of the person shown to them at the unfair confrontation, not the image of the person observed at the scene of the crime.

II. Introduction of Prior Testimony.

The defendant at a criminal trial is entitled to have the witnesses against him testify in the presence of the jury that will decide his fate. The mere existence of cross-examination during previous testimony does not permit the jury to evaluate the witnesses attitude, demeanor, responses, and over-all appearance while testifying. The procedure approved by the District Court deprived appellant of a fair trial because the witness was apparently within the jurisdiction of the District Court, and the Government did not show reasonable cause for not producing her to testify.

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ARGUMENT

I. The District Court erred in permitting the witnesses to identify appellant during the trial.

This case presents a previously unexplored facet of the problems resulting from unfair extra-judicial confrontations between criminal defendants and the witnesses against them. Judicial recognition of this problem stems from slightly more than one page of the Supreme Court's opinion in Stovall v. Denno, 388 U.S. 293 (1967), in which the Court recognized that such confrontations could be so "unnecessarily suggestive and conducive to irreparable mistaken identification that he [defendant] was denied due process of law." 388 U.S. at 302.

Subsequently, this Court has, in at least twenty written opinions, explored the ramifications of this concept, and the related requirement that accused persons be represented by counsel during all such confrontations. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967). In a recent, comprehensive opinion, this Court, en banc, considered three cases presenting a variety of factual circumstances for the application of the legal principles involved. Clemons v. United States, Clark v. United States, and Hines v. United States, _____ U.S. App. D.C. _____, _____ F.2d _____ (Nos. 19,846; 21,249; Dec. 6, 1968). However, in none of those cases, nor in any other of the cases in this area, has there been presented a situation where the only witnesses to identify the accused were also subject to confrontations with him under circumstances which the District Court held deprived the defendant of his right to due process of law.

In this case the District Court held hearings into the circumstances of the confrontation, and held that the circumstances of that confrontation were "so unnecessarily suggestive and conducive to irreparable mistaken identity as to amount to a denial of due process of law * * *." United States v. O'Connor, 282 F. Supp. 963, 967 (D.D.C. 1968). The District Court went on to hold, however, that in-court identification would be permitted because there

were "sources independent of the show-up." 282 F. Supp. at 967. In reaching this conclusion the District Court erred both in the applicability and the interpretation of the rule allowing identifications based upon an independent basis.

A. Applicability of the "independent basis" rule.

The development of the "independent basis" rule in this jurisdiction originated with this Court's opinion in Wright v. United States, _____ U.S. App. D.C. _____, ___ F.2d ____ (No. 20, 153; Jan. 31, 1968), where it was stated that if a new trial resulted from the hearing on remand:

> "The Government will be afforded 'the opportunity to establish by clear and convincing evidence that' her in-court identification was 'based upon observations of the suspect other than the [station house] identification'."

The source of the quotation within this statement is United States v. Wade, and Gilbert v. California, supra. However, in neither of those cases was the defect in the identification process so unfair as to constitute a violation of the accused's right to due process of law. Although the prosecution in both cases was to be afforded an opportunity to prove "by clear and convincing evidence" that the in-court identification had an independent basis, the extra-judicial confrontation did not necessarily color any recollection of the witnesses, as it necessarily must in this case.

The situation in Simmons v. United States, 390 U.S. 377 (1968), although dealing with photographic identification, is much more in point. There, the Court stated:

> "Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than the persons actually seen, reducing the trustworthiness of subsequent lineup or courtroom identifications."

390 U.S. at 383-4. What the Court said with respect to photographs is even more forcefully apparent when the initial misidentification results from showing the witness the accused himself.

Although this Court has repeatedly stated that the Government should be permitted, in a Stovall case, to show an independent basis for in-court identifications, in none of those cases were all the witnesses tainted by the illegal confrontation. In such cases, the "totality of the circumstances surrounding" the confrontation may be such that the defendant was not actually deprived of due process. Here, however, the only witnesses were subjected to procedures likely to produce an "irreparable mistaken identification". Such a mistake certainly cannot be repaired by ignoring it, which is the effect of the District Court's holding.

In the Clemons group of cases, this Court declined to adopt a per se exclusionary rule. See pages 9 and 30 of the slip opinion. In those cases the ruling appears to have been correct because the extrajudicial confrontation there did not create a substantial liklihood of irreparable misidentification, such as exists in the present case. Therefore, the totality of the circumstances at the trial,

such as the existence of "untainted" witnesses, indicates that the confrontation itself did not deny those defendants of their right to due process of law.

Here, however, the situation is different, and there are no other witnesses to identify appellant as the criminal, and there is no independent evidence placing appellant at the scene of the crime. Compare Cunningham v. United States, _____ U.S. App. D.C. ____, ____ F.2d ____ (No. 21,450; Feb. 19, 1969). Therefore, when all identifications that might be based upon the illegal confrontation are excluded, see Wong Sun v. United States, 371 U.S. 471 (1963), there is no longer any basis upon which the conviction can stand. Chapman v. California, 386 U.S. 18 (1967).

B. Proper interpretation of the "independent basis" rule.

Even assuming that the District Court was correct in deciding that an independent basis could properly be established for in-court identifications in Stovall cases, the use of that theory is not supported by the facts in this case. Here, the criminal was in the presence of the witnesses for only a short time, his face was partially obscured by a mask, and the witnesses did not give the police a description which included any distinctive physical characteristics. Appellant was concededly wearing a mustache at the time the crime was committed, but neither witness said anything to the police about a mustache.

The witnesses did describe the gunman as having a "blotchy" complexion. However, their attempt to particularize the condition in terms of the appellant was less than satisfactory. In common understanding, it seems doubtful that "blotchy" connotes being unshaven or having a lotion on one's neck.

A proper finding of an independent basis must be predicated either upon an opportunity to observe the accused in circumstances other than when the crime is being committed, see Hines v. United States, supra, or upon an ability to give an accurate and detailed description of physical characteristics, see Clark v. United States, supra.

If a witness has been subjected to the emotional stress of being a victim of a crime, his clarity of recall must necessarily be clouded. Counsel for the Government in this case made the point very cogently when he stated during his summation:

> "The fact of the matter is both Mr. Perper and Mr. Johnson said they can identify the man positively [,] that he is the man. They cannot answer questions about minute details. I ask you in your experience, if you were the victim of a robbery, just what kind of questions you can answer." [Tr. 387]

These, however, are the very questions that must be answered to support a finding of independent source for identification.

There is no question but that the witnesses were sincere in their identification, and that they testified strongly and unequivocally at the trial. However, where the

liklihood of misidentification is as strong as it is in this case, something more is necessary than positive testimony by "tainted" witnesses.

The previous decisions of this Court give some guidance in this respect. In Cunningham v. United States, supra, the witness-victim described a distinctive scar. In Dade v. United States, _____ U.S. App. D.C. ____, ____F.2d ___, (No. 20,712; Dec. 24, 1968), the witness participated in the construction of a composite drawing, based upon which a police officer recognized the defendant. In Calhoun v. United States, _____ U.S. App. D.C. ____, ____ F.2d ____, (No. 21,119; Aug. 9, 1968) the witness described a distinctive garment. See also Thomas v. United States, _____ U.S. App. D.C. _____, 387 F.2d 191 (1967). See also Macklin v. United States, ____ U.S. App. D.C. ____, ___ F.2d ____ (No. 21, 377; Feb. 18, 1969).

These cases may profitably be compared with the opinion in Sera-Leyva v. United States, ____ U.S. App. D.C. _____, ____ (No. 20,619; Feb. 18, 1969) where the witness-victim had an excellent opportunity to observe the criminal. This Court refused to find an "independent source" in the record, stating:

> "While Massey's identification is unusually strong, and there was good lighting, we hesitate to initiate a finding of independent source. It happens that we do not have evidence in the record of a detailed description by the identifying witness prior to the confrontation in issue. * * * We by

> no means suggest that we find problems with Massey's description of the robber, but only say that it did not include the kind of distinctive physical or other characteristics that would itself lead an appellate court to initiate a finding of independent source." Slip opinion, pages 6-7.

Similarly in Smith v. United States, _____ U.S. App. D.C. ____, ____F.2d ___ (No. 20,773; June 7, 1968) this Court remanded for further hearings despite the complaining witness' positive and emphatic identification.

The other situation in which Courts has properly found an independent basis for identification is when the witness observed the defendant apart from his observations at the scene of the crime. See Dade v. United States, supra; Patton v. United States, ____ U.S. App. D.C. ____, ____ F.2d _____ (No. 21,161; Oct. 29, 1968); Rivers v. United States, 400 F.2d 935 (5th Cir. 1968); and Caples v. United States, 391 F.2d 1018 (5th Cir. 1968).

In summary, the witnesses observed a masked gunman for a short period of time and failed to describe to the police any distinctive physical characteristics upon which an identification of appellant could reasonably be based. Also, neither witness had any other opportunity to observe the criminal, and there were no other witnesses nor any independent evidence placing appellant at the scene of the crime. Accordingly, appellant's conviction should be reversed, and the case remanded for a new trial at which all identification evidence should be excluded.

II. Introduction of Prior Testimony.

The Sixth Amendment to the Constitution of the United States preserves to a criminal defendant the right to be confronted with the witnesses against him. The Supreme Court in Mattox v. United States, 156 U.S. 237 (1895), forcefully stated the basic policy inherent in this right as follows:

> "The primary object * * * was to prevent depositions or ex parte affidavits * * * being used against the prisoner in lieu of a personal examination and cross examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony is worthy of belief." 156 U.S. at 242-243.

The District Court's Memorandum on this issue states that the witness involved was probably within the jurisdiction, but was apparently attempting to evade process. It is undoubtedly true that the Government attempted, in good faith, to secure the attendance of the witness. However, the diligence of this attempt is questionable. One trip by a U.S. Marshall and one trip by a detective, together with telephone calls by counsel for the Government, hardly indicates industriousness for which the prosecution could be commended. The backlog of work in the Marshall's office and the U.S. Attorney's Office in this jurisdiction is no excuse for depriving appellant of his constitutional rights.

The Supreme Court's recently expressed concern regarding the right to confrontation indicates clearly that inconvenience of the prosecuting authority will not be regarded as an adequate basis for introducing testimony in the manner in which it was done in this case. Barber v. Page, ____ U.S. _____, 20 L.ed. 255 (1968).

There may be circumstances in which a witness within the jurisdiction of the trial court is "unavailable" at the time of trial. However, the facts in this case do not support a finding that this witness was truly "unavailable". Furthermore, the mere fact of cross-examination at the prior trial does not absolve the Government here. The appellant is entitled to have the jury observe the witness in person. Because this was not done, appellant's conviction must be reversed. Pointer v. Texas, 380 U.S. 400 (1965).

CONCLUSION

For the reasons expressed in either Point I or Point II, above, the conviction of appellant Benjamin F. O'Connor should be reversed and remanded to the District Court for a new trial, with instructions to the trial court to exclude all evidence by which appellant is identified

by the witnesses Perper and Johnson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief for Appellant on appellee by mailing a copy thereof, first class mail, postage prepaid, this first day of April, 1969, to David G. Bress, Esquire, United States Attorney in and for the District of Columbia, United States Court House, Washington, D. C.

Burke W. Willsey

APPENDIX

Constitution of the United States

Amendment Number V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment Number VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

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District of Columbia Code, (1967 ed.) Title 22, Sections 501, 502, and 3204:

> §22-501. Assault with intent to kill, rob, rape, or poison.
>
> "Every person convicted of any assault with intent to kill or to commit rape, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring,

or cistern of water, shall be sentenced to imprisonment for not more than fifteen years."

§22-502. Assault with intent to commit mayhem or with dangerous weapon.

"Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than ten years.

§22-3204. Carrying concealed weapons.

"No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,999

BENJAMIN F. O'CONNOR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

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FILED JUN 18 1969

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TABLE OF CASES

* Cases chiefly relied upon marked by an asterisk.

ISSUES PRESENTED *

In the opinion of appellee, the following issues are presented:

1) Did the District Court commit reversible error by holding that the courtroom identification of appellant stemmed from the confrontation at the time of the crime and was wholly independent of the invalid pre-trial show up.

2) Did the District Court commit reversible error by admitting prior testimony of a witness, who had been subjected to cross-examination in an earlier trial of defendant involving identical issues, on the basis of the Court's determination that the witness was not available.

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* This case has never previously been before this Court.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,999

BENJAMIN F. O'CONNOR, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed April 5, 1966, appellant was charged in three counts with assault with intent to commit robbery, assault with a dangerous weapon, and carrying a dangerous weapon in violation of 22 D. C. Code §§ 501, 502, and 3204. These charges stemmed from the attempted daylight robbery of the Argo Market in Washington, D. C. After a trial before United States District Judge Oliver Gasch sitting with a jury on March 5-7, appellant was found guilty as charged and sentenced to three concurrent three to ten year terms in prison.

The attempted robbery was witness by Theodore Perper (the store owner) and James Johnson (a customer). Mr.

Johnson testified that the assailant came in the store and placed a woman's nylon over his face (Tr. 48).** Mr. Johnson also said he saw the man's face before he put the mask on (Tr. 68). Mr. Perper, from about 30 inches, saw the lower part of the man's face clearly, and the upper part through a very sheer woman's stocking (Tr. 6, 20). The description given police by Mr. Perper moments after the robbery was that the man was a Negro male in his early 20's, from 5 feet 7 inches to 5 feet 9 inches, medium build, dark complexion with blotchy skin on his neck, wearing a tan trench coat and dark felt hat (Pr. H. 30, 43; Tr. 20). Mr. Johnson's description to the police was similar (Tr. 68).

On the morning following the aborted robbery, both Mr. Perper and Mr. Johnson were asked to come to the Police Station to view appellant and his uncle. Mr. Perper and Mr. Johnson both, individually and separately, identified appellant as the man who had attempted to rob the Argo Market (Pr. H. 22; Tr. 54).

On March 4, 1968, a preliminary hearing was held on the issue of identification. At that hearing, Mr. Perper in response to the judge's question said he could identify appellant solely on what he saw in his store on January 20, 1966 (Pr. H. 30); his identification testimony at trial related only to the events of the attempted robbery. At the trial, Mr. Johnson also indicated that his in-court identification resulted *only* from the store encounter (Tr. 61, 82, 83).

These in-court identifications were allowed in accordance with the Court's holding at the preliminary hearing that despite its finding of an invalid show-up under the due process standards in *Stovall* v. *Denno*, 388 U.S. 293, the identification testimony in this case was not tainted thereby, but was solely predicated upon the witnesses' memory of the events of the crime (Pr. H. 89) *United States* v. *O'Connor*, 282 F. Supp. 963 (D.C.C. 1968).

** Throughout this brief, Tr. —— refers to trial transcript and Pr. H. —— refers to the preliminary hearing transcript.

During the trial, the Court, after a hearing, admitted the transcript of Mrs. Couch's prior testimony to be read to the jury (Tr. 128, 155-176). To secure the witness' presence, the United States Marshal sent a subpoena (Tr. 96), not less than 10 telephone calls were placed (Tr. 96, 97), and a Police Detective went to her home (Tr. 97). Another detective again went to her home with a subpoena (Tr. 97). This testimony, concerning the license plate numbers of a car seen near the Argo Market, had been given in the earlier mistrial of appellant. The parties, issues, and defense attorney were identical to the trial in which the transcript was read.

On May 15, 1968, the District Court re-examined its holding as to the admission of the prior testimony of Mrs. Couch in light of the Supreme Court's opinion in *Barber* v. *Page*, —— U.S. ——, 20 L. ed. 2d 255 (1968). In a memorandum, the Court stated that its original holding was correct.

ARGUMENT

I. The District Court did not err in permitting the witnesses to make in-court identifications of appellant.

As appellant points out in his brief, this Court has repeatedly stated that the Government should be permitted under the *Stovall* decision, to show an independent basis for in-court identifications following an invalid lineup. This has become a rule of law in the District. *Wright* v. *United States*, —— U.S. App. D.C. ——, —— F.2d —— (No. 20,153; January 31, 1968).

Thus, the issue before the Court was a factual one: did the Government prove by "clear and convincing evidence" that the in-court identification had an independent basis from the invalid show-up?

The Trial Court observed the witnesses, weighed the facts presented and considered the applicable legal rule of *Stovall* and *Wright*, supra. The District Court, as reported in *United States* v. *O'Connor*, 282 F. Supp. 963 (D.D.C. 1968), answered this factual question affirma-

tively as to Mr. Johnson and Mr. Perper. As to Mr. Perper, the Court took note of his ability to see the man's features, his accurate description of the robber moments after the robbery, and his testimony that he could make his identification solely from his observations at the scene of the crime. Similar considerations went into the finding that Mr. Johnson's identification also stemmed from the crime scene observations.

In the case of *Hines* v. *United States*, —— U.S. App. D.C. ——, (No. 21,249; December 6, 1968), the Court recognizing that the Supreme Court expressly contemplated the use of an independent basis rule, made the following observation as to the priority of reliance upon the witness' positive assertion of independent basis:

> ". . . although the positiveness of the witness about an independent base for an in-court identification is a relevant factor, it is to be weighed warily and in the realization that the most assertive witness is not invariably the most reliable one. But this is a phenomenon of which experienced trial judges need no reminder from us, and we have no reason to doubt that the rulings in question were made with ample awareness of it."

The Government submits that Judge Gasch, as an experienced trial judge, was well aware of this phenomenon when he found that the witnesses' identification to have an independent basis. And, as stated above, it is clear that he relied upon the "totality of circumstances" surrounding the store confrontation. (*O'Connor*, supra at 967.)

II. The Trial Court did not commit reversible error in finding Mrs. Couch to be unavailable and thereby admitting her prior testimony.

In *Barber* v. *Page*, —— U.S. ——, 20 L. Ed. 2d 255 (1968), Justice Marshal, speaking for eight members of the Court points out at 258, "It is true that there has traditionally been an exception to the confrontation re-

quirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant." The Court then found that the "State made absolutely no effort" to obtain the witness. The Court stated at 260 the governing rule as follows: "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." Non-availability of a witness is accepted as a basis for admitting prior testimony in the District of Columbia Circuit. "It is the established rule in federal courts that testimony given in a former criminal trial is admissible in a retrial of that cause when the witness has become unavailable." (Citing Fed. R. Crim. P. 26.) *Coppedge* v. *United States*, 114 U.S. App. D.C. 79, 311 F.2d 128 (1962), *cert. denied*, 373 946 (1963).

At the prior trial of appellant, the witness was subject to, and subjected to cross-examination. The issues were identical, the parties were identical and even the counsel was identical to the case at hand. Therefore, appellant's reliance on *Pointer* v. *Texas*, 380 U.S. 400 (1965), is misplaced. Thus, in that case on page 407, the Court pointed out that "The case before us would be quite a different one had Phillips' statement been taken at a full fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." Appellant was represented by very able counsel, he was given a complete opportunity to cross-examine the witness and he exercised it fully.

Therefore, the only real question on this aspect of the case is whether the Trial Court erred in determining that Mrs. Couch was unavailable. This turns upon the Government's good faith effort to secure her presence at the trial. (*Barber* v. *Page*, supra.)

The Government submits that the Trial Court did not err in finding that the prosecution had been diligent in their efforts. Prosecution counsel made not less than 10

quirement where a witness is unavailable and has given testimony at previous judicial proceedings against the same defendant." The Court then found that the "State made absolutely no effort" to obtain the witness. The Court stated at 260 the governing rule as follows: "In short, a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial." Non-availability of a witness is accepted as a basis for admitting prior testimony in the District of Columbia Circuit. "It is the established rule in federal courts that testimony given in a former criminal trial is admissible in a retrial of that cause when the witness has become unavailable." (Citing Fed. R. Crim. P. 26.) *Coppedge* v. *United States*, 114 U.S. App. D.C. 79, 311 F.2d 128 (1962), *cert. denied*, 373 946 (1963).

At the prior trial of appellant, the witness was subject to, and subjected to cross-examination. The issues were identical, the parties were identical and even the counsel was identical to the case at hand. Therefore, appellant's reliance on *Pointer* v. *Texas*, 380 U.S. 400 (1965), is misplaced. Thus, in that case on page 407, the Court pointed out that "The case before us would be quite a different one had Phillips' statement been taken at a full fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." Appellant was represented by very able counsel, he was given a complete opportunity to cross-examine the witness and he exercised it fully.

Therefore, the only real question on this aspect of the case is whether the Trial Court erred in determining that Mrs. Couch was unavailable. This turns upon the Government's good faith effort to secure her presence at the trial. (*Barber* v. *Page*, supra.)

The Government submits that the Trial Court did not err in finding that the prosecution had been diligent in their efforts. Prosecution counsel made not less than 10

attempts to secure Mrs. Couch's presence, the United States Marshal attempted to serve her with a subpoena, and two detectives attempted to make contact with her. The record clearly shows, and the lower Court properly found, that the witness was unavailable and that the Government was diligent in their efforts to secure her presence. (*Barber* v. *Page*, supra, *Coppedge* v. *United States*, supra.)

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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